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IN THE

Supreme Court of the United States

October Term, 1972

No. 72-991

JACK MILLER, a/k/a, CHARLES MULLER,
Petitioner,

vs.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The petitioner, Jack Miller, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in the above-entitled case on November 16, 1972.

Opinion Below

The order of the Court of Appeals, dated November 16, 1972, is reprinted in the Appendix hereto, p. A-1, *infra.* The Court of Appeals wrote no opinion.

Jurisdiction

Following a nonjury trial, the petitioner was found guilty of receiving certain sums of money from an employer whose employees were represented by Teamsters Local Union No. 158, of which the petitioner was Secretary-Treasurer, in violation of 29 U.S.C. § 186(b), and of conspiring to violate § 186(b).

On April 26, 1972 the petitioner was sentenced by the Honorable A. Leon Higginbotham, Jr., of the Eastern District of Pennsylvania, to a term of imprisonment on weekends for a period of three months and a fine of $1,500 on count 6 of the indictment, and to a term of probation for five years on counts 1 through 6 of the indictment.

The Court of Appeals for the Third Circuit affirmed the judgment of conviction on November 16, 1972.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Question Presented

Whether the petitioner was denied due process of law where the government failed to meet its burden of proof and the unsubstantial, incredible and uncorroborated testimony of an accomplice constituted the sole basis for the petitioner's conviction.

Constitutional Provision

AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause

of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Statute Involved

29 U.S.C. § 186(a)(1-4) and (b)(1):

> (a) It shall be unlawful for any employer or association of employers or any person who acts as a labor relations expert, adviser, or consultant to an employer or who acts in the interest of an employer to pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value—
>
> (1) to any representative of any of his employees who are employed in an industry affecting commerce; or
>
> (2) to any labor organization, or any officer or employee thereof, which represents, seeks to represent, or would admit to membership, any of the employees of such employer who are employed in an industry affecting commerce; or
>
> (3) to any employee or group or committee of employees of such employer employed in any industry affecting commerce in excess of their normal compensation for the purpose of causing such employee or group or committee directly or indirectly to influence any other employees in the exercise of the right to organize and bargain collectively through representatives of their own choosing; or
>
> (4) to any officer or employee of a labor organization engaged in an industry affecting commerce with intent to influence him in respect to any of his actions, decisions, or duties as a representative of employees or as such officer or employee of such labor organization.
>
> (b)(1) It shall be unlawful for any person to request, demand, receive, or accept, or agree to receive or accept, any payment, loan, or delivery of any money or other thing of value prohibited by subsection (a) of this section.

Statement

In August of 1962 the employees of H. P. Tool Manufacturing Corporation in Philadelphia, Pennsylvania, were organized by the International Brotherhood of Teamsters, Local 158 which was certified as the bargaining representative of these employees after an NLRB election (33a).* Active in the organization of the company's employees were the petitioner, Jack Miller, Secretary-Treasurer of Local 158, and Raymond Oates, President of Local 158.

Both Miller and Oates were men of outstanding reputation, as attested to by several judges, lawyers, business executives, and others who testified at the non-jury trial (87-106).

H. P. Tool Company

The H. P. Tool company was a family owned firm heavily dependent upon government contracts for its business (44a, 48a, 114a). Preston Komins, the government's primary witness and an accomplice if the crimes charged were actually committed by the petitioner and Oates, was the president of the company (10a). Edwin Komins, Preston's brother, was the secretary-treasurer of the company (96a).

Komins' Offer of a "Gift"

In October of 1962 the then 15-man union picketed the company's establishment, having arrived at an impasse in their contract negotiations (34a, 63a). According to Preston Komins, he talked with a member of the picket line who referred Komins to the petitioner and Oates (11a). In a meeting which he initiated, Preston Komins talked with

* Numbers in parentheses followed by an "a" refer to pages in the printed Appendix filed in the Court of Appeals. Numbers not accompanied by an "a" refer to the stenographic trial transcript.

the petitioner and Oates at a union hall in Philadelphia, where Komins offered these union officials "a gift" to obtain more favorable treatment for his company (14a).

Komins' Perjury and Government Contracts Blacklist

Komins, whose indictment for perjury was dismissed after he gave a statement to the FBI favorable to the government's case and whose company was removed from the government contracts blacklist as a result of his statement and promise to testify, then arranged to pay the petitioner and Oates each $250 annually as a result of their alleged agreement to provide more favorable working agreement terms to Komins' company (15a, 29a, 55a-57a). These payments were supposedly made around Christmastime when clandestine cash or checks were made available to Preston Komins by his brother, Edwin, for their regular year-ending gifts to customers, bankers and the like (20a-21a).

Edwin Komins was never informed of the purpose for which this money was used and, conveniently, no one other than Preston Komins ever witnessed the actual payment of these funds to the petitioner and Oates (17a-20a). Moreover, Komins could not recall when or where these payments were made.

3-Year Contract—Federal Mediation

In October of 1967 the Komins brothers met with Miller and Oates to arrange for a three-year contract to replace the regular two-year contract (21a). At this meeting, the petitioner is alleged to have requested an additional annual payment of $250 for such a contract (23a). The petitioner and Oates never negotiated any contract with the company representatives, and the 1967 contract was agreed upon only after federal mediation (16a, 106a). A member of the

union's negotiating team was present in the courtroom and could have been subpoenaed by the government to test the veracity of Komins' accusations, but no subpoena was ever issued (16a).

Documentary and Character Evidence

The government, despite its possession of all of the company's checks, did not offer *any* exhibits into evidence. All of the exhibits were offered by the petitioner and Oates. These included company checks, working agreements, NLRB documents showing the date of Local 158's certification as bargaining representative for the company's employees, Labor Department reports showing that the only work stoppage at the H. P. Tool company occurred in 1962 and not in 1965 as erroneously stated by Preston Komins, and a letter from the *prosecutor* to an official of the United States government contracts office requesting that the Komins' company be removed from the blacklist (53a-59a).

The defense introduced four judges, seven lawyers, seven business executives and management officials, a state legislator, a deputy city commissioner, a retired police officer, two insurance brokers, a fireman, and a hotel manager, and others, all of whom attested to the excellent reputation enjoyed by the petitioner and Oates (87-106). Three of the management officials, one a retired Navy captain, have had occasion to negotiate with the petitioner and Oates regarding union-management affairs and have always found these gentlemen to be of the highest character (104, 105, 106).

As previously indicated, on April 26, 1972 the petitioner was sentenced to a term of weekend imprisonment for three months, probation for five years and a fine of $1,500. The Court of Appeals affirmed the judgment of conviction on November 16, 1972.

REASONS FOR GRANTING THE WRIT

I.

The petitioner was denied due process of law where the government failed to meet its burden of proof and the unsubstantial, incredible and uncorroborated testimony of an accomplice constituted the sole basis for the petitioner's conviction.

The seeds of a major constitutional controversy were planted in this case when the government elected to prosecute the petitioner knowing that its entire case was based upon the unsubstantial, incredible and uncorroborated testimony of a self-styled perjurer and accomplice.

This Court's decision in *In re Winship,* 397 U.S. 358 (1970), affirmatively resolved any question that proof beyond a reasonable doubt is a constitutional requirement in all criminal prosecutions. See *Cool* v. *United States,* U.S. , 93 S.Ct. 354, 357 (December 4, 1972). Where the reasonable doubt standard is not met the government has failed to sustain its burden of proof and the defendant is denied due process of law. Thus it was imperative that the government here prove the petitioner's guilt beyond a reasonable doubt and its reliance upon the testimony of Preston Komins so flagrantly denied the petitioner due process of law that this constitutional infringement should not be ignored by the Court.

There are numerous decisions in the various federal circuits which hold that an accomplice's testimony need not be corroborated and that such testimony may be sufficient to sustain a conviction. However, that rule does not encompass a situation such as the present case, where the accomplice's testimony is the basis for the conviction and yet is unsubstantial and incredible as a matter of law.

United States v. *Washington*, 429 F.2d 409 (4th Cir. 1970); *United States* v. *Horning*, 409 F.2d 424 (4th Cir. 1969). Moreover, many of the circuit courts are disposed to buttress their decisions by reference to "strong corroborating evidence." *United States* v. *Plemons*, 455 F.2d 243, 246 (10th Cir. 1972). Cf. *Stewart* v. *United States*, 412 F.2d 818 (5th Cir. 1969).

Though this Court has intimated acceptance of the no-corroboration rule, its acceptance has been guarded and deserves review. This case more than any other demonstrates the vice of sustaining a conviction on the basis of uncorrobated testimony of an accomplice. We urge the Court to adopt the corroboration requirement for accomplice testimony because of the denial of basic due process principles occasioned by criminal convictions sustained solely upon the basis of uncorroborated accomplice testimony.

In *Holmgren* v. *United States*, 217 U.S. 509 (1909), the Court declined to reverse a conviction for false swearing in naturalization proceedings and held that the trial court did not err by failing to instruct the jury that a particular witness was an accomplice whose testimony required corroboration. The Court wrote.

> "It is undoubtedly the better practice for courts to caution juries against too much reliance upon the testimony of accomplices, and to require corroborating testimony before giving credence to them." (217 U.S. at 523-524)

A few years later the Court tangentially reviewed the corroboration requirement in *Caminetti* v. *United States*, 242 U.S. 470 (1917), where it was written:

> "In *Holmgren* . . . this court [said] . . . it is the better practice for courts to caution juries against too much reliance upon the testimony of accomplices, and to require corroborating testimony before giving credence to such evidence. While this is so, there is no

> absolute rule of law preventing convictions on the testimony of accomplices if juries believe them." (242 U.S. at 495)

More recently the Court referred to the no-corroboration rule with considerable concern for its inherent weaknesses. In *Krulewitch* v. *United States,* 336 U.S. 440 (1949), the Court scrutinized the increasingly loose application of the conspiracy doctrine by the government. In that context the Court wrote:

> "Moreover, in federal practice there is no rule preventing conviction on uncorroborated testimony of accomplices, as there are in many jurisdictions, and the most comfort a defendant can expect is that the court can be induced to follow the 'better practice' and caution the jury against 'too much reliance upon the testimony of accomplices.' *Caminetti* v. *United States,* 242 U.S. 470, 495 . . ." (336 U. S. at 454)

In *Cool* v. *United States, supra,* the Court was confronted with the unusual circumstance where the petitioner sought to use the testimony of an accomplice to demonstrate his innocence. Though considering an issue not directly relevant here, the Court reaffirmed two critical rules germane to our petition: (1) proof beyond a reasonable doubt is a constitutional requirement, and (2) the testimony of an accomplice is inherently suspect. See *Crawford* v. *United States,* 212 U.S. 183, 204 (1909). Thus the no-corroboration rule unique to the federal courts has always troubled this Court and has received only negative acceptance.

It is apparent that the Court's instruction in *Holmgren, Caminetti, Krulewitch,* and *Cool* has fallen among thorns and has little chance for survival unless the underbrush is cleared away. For in virtually every circuit our federal courts have drifted away from the moorings so carefully placed in those cases.

In *United States* v. *Adams*, 454 F.2d 1357 (7th Cir. 1972), for example, the Court of Appeals misconstrued this Court's holding in *Caminetti* by asserting that, ". . . it is well established that the testimony of an accomplice need not be corroborated." (454 F.2d at 1360.) The Third Circuit Court of Appeals has similarly misunderstood this Court's infrequent soundings in this area by declaring, "We follow the Supreme Count in holding that uncorroborated accomplice testimony may constitutionally provide the exclusive basis for a criminal conviction." *United States* v. *DeLarosa*, 450 F.2d 1057, 1060 (3d Cir. 1971). See also *United States* v. *Gordon*, 433 F.2d 313 (2d Cir. 1970), where the Second Circuit Court of Appeals wrote, ". . . the federal rule is well established that a defendant may be convicted upon the uncorroborated testimony of an accomplice. [Citing *Caminetti*]." (433 F.2d at 314.)

These Court of Appeals decisions sorely abuse this Court's decision in *Caminetti* and press a rule which has never been adopted affirmatively by the Court. Moreover, the no-corroboration rule is now in direct conflict with the Court's recent holdings in *Winship* and *Cool* requiring proof beyond a reasonable doubt before a criminal conviction is able to withstand a constitutional challenge. For it has long been recognized that the testimony of an accomplice is inherently suspect, a fact which has prompted most jurisdictions to adopt the corroboration requirement. 30 Am. Jur. 2d, Evidence, §§ 1151, 1153. Cf. Anno., 19 A.L.R. 2d 1352.

Therefore, this petition presents a peculiarly appropriate vehicle for review of the question whether a defendant may constitutionally be convicted solely on the basis of the uncorroborated testimony of an accomplice.

In our case Preston Komins, if he actually gave money to the petitioner, violated 29 U.S.C. § 186(a). He was an indispensable partner in the commission of the crimes charged against the petitioner, and there can be no question that he was an accomplice if the crimes were committed. Komins testified before the grand jury and told the grand jury that no such payments were made to the petitioner. Komins was subsequently indicted for perjury, as a result of which his company was placed upon the government contracts blacklist. In desperation Komins altered his testimony and gave the FBI a statement conforming to his trial testimony. Later the perjury charge was dismissed and Komins' company was removed from the government blacklist.

Upon cross examination Preston Komins answered no fewer than sixty questions with responses such as "I don't remember," "I believe so," "I might have," and "It's possible." Komins could not remember either the *time* or the *place* where the alleged payments were supposedly made, making a defense virtually impossible. These evasive answers effectively denied the petitioner his Sixth Amendment right to confront his accusers.*

Normally the right of confrontation is satisfied by the right to cross examine the government's witnesses. However, our case is unique because it presents a one-on-one accusation with no other witnesses to the alleged crime. Preston Komins' allegations of agreement and payment to the petitioner cannot be refuted only because of Komins' refusal or inability to specify the time and place of the

* In this context, we cannot resist reminding the Court that if a grand jury witness who has been granted immunity were to testify in this fashion, the likelihood is great indeed that he would be indicted for perjury or contempt. Surely uncorroborated testimony of this sort is insufficient to sustain a criminal conviction.

alleged agreement and payments. Where the petitioner is burdened with the substantive allegation of the government witness, his right to an effective cross examination on these critical points may not be thwarted by evasive answers without denying the petitioner the substance of his Sixth Amendment right to confront his accusers.

Since the petitioner is presumed to be innocent to possess no knowledge of these alleged payments, his right to this potentially exculpatory information cannot be successfully challenged, and Komins' evasive answers on these critical points constitute reasonable doubt as a matter of law. In the absence of any exculpatory material provided under the authority of *Brady* v. *Maryland*, 373 U.S. 83 (1963), or 18 U.S.C. § 3500 *et seq.*, these critical evasive answers violated the petitioner's Sixth Amendment rights.

Despite the appearance of two other government witnesses, the petitioner's conviction is based solely upon the testimony of Preston Komins. A former Internal Revenue Service agent's testimony in no way connected the petitioner to any crime, for his testimony dealt solely with an unrelated examination of the company's books and his action in adjusting the company's income tax return.

Preston Komins' brother, Edwin, testified that he made company funds available to Preston for purposes of year-ending gifts to various individuals such as company customers and bankers. Edwin's testimony in no way connected the petitioner to the commission of any crime. Thus essentially innocent acts composed of meetings between management personnel of the H. P. Tool Manufacturing Corporation and leaders of Teamsters Local 158 took on sinister and unlawful connotations solely because of the uncorroborated testimony of Preston Komins.

The total lack of corroborative evidence thus served to deny the petitioner due process of law, for the constitutional standard of guilt beyond a reasonable doubt was not satisfied by the accomplice testimony in this case.

The petitioner was denied due process of law and certiorari should be granted to review the judgment of the Court of Appeals.

CONCLUSION

When a man of the petitioner's outstanding reputation as a respected union leader is cut down by the uncorroborated testimony of a vacillating witness like Preston Komins, then the time is ripe for a careful review by this Court of the no-corroboration rule running unchecked in our federal courts. More importantly, since the Court has elevated the reasonable doubt standard to constitutional heights, that standard can no longer co-exist with the federal no-corroboration rule applied to accomplice testimony.

Where the accomplice's testimony is unsubstantial there exists reasonable doubt as a matter of law and corroboration is required before this constitutional impairment can be removed. The requirement of corroboration would act to safeguard all defendants who are victimized by the dubious testimony of an accomplice, particularly in close cases, where the reasonable doubt standard might be tacitly abused by the trier of fact.

For all of these reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: January 12, 1973.

APPENDIX

Order

Nos. 72-1506 & 72-1507

UNITED STATES OF AMERICA,

v.

RAYMOND A. OATES, JACK MILLER, a/k/a H. CHARLES MULLER.

Raymond A. Oates, Appellant in No. 72-1506.

Jack Miller, Appellant in No. 72-1507.

(Eastern District of Penna. Criminal No. 71-54.)

Submitted Under Third Circuit Rule 12(6)
November 16, 1972.

Before: Aldisert, Gibbons, and Hunter, *Circuit Judges.*

After considering the contentions of appellants presented by brief, viz., that the government did not sustain its burden of proof because of alleged defective accomplice testimony.

It is ORDERED that the judgment of the district court be and is hereby affirmed.

BY THE COURT,
ALDISERT,
Circuit Judge.

Dated: November 16, 1972.

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-991

JACK MILLER, A/K/A CHARLES MULLER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Following a bench trial in the United States District Court for the Eastern District of Pennsylvania, petitioner, the secretary-treasurer of a Teamsters Union local, was convicted of having obtained money from an employer during the course of union contract negotiations, in violation of 29 U.S.C. 186(b), and of conspiring to commit that offense, in violation of 18 U.S.C. 371. He was sentenced to imprisonment for each and every weekend for a period of three months, fined $1500, and placed on probation for five years. The court of appeals affirmed (Pet. App.)[1]. Petitioner contends here, as he did below, that the evidence was insufficient to support his conviction.

[1] See also *Miller* v. *United States*, No. 72-736, pending on petition for a writ of certiorari, in which petitioner seeks review of his conviction for embezzling union funds.

The evidence adduced at trial showed that on six occasions between December 1965 and October 1969, petitioner and co-defendant Raymond Oates, acting on behalf of Local 158, negotiated contracts with the management of H-P Tool Manufacturing Company; at petitioner's suggestion, this company paid them various sums of money to obtain favorable contract terms (A. 8-29).[2]

The government's chief witness was Preston Komins, the president of H-P Tool during the period covered by the indictment. Komins testified that he had initially contacted petitioner and Oates in an effort to settle a labor dispute between his company and Local 158; he subsequently met with them at a union hall in the Richmond section of Philadelphia (A. 11-13).[3] Komins explained that the demands of the union were greater than his company could afford and, in the course of the conversation, Komins "offered a gift, or whatever you want to call it" to obtain more favorable demands (A. 14). Petitioner and Oates agreed to reduce the union's demands in return for annual payments of $250 each (A. 15). The demands were lowered, and the payments were made, in cash, by Komins personally to petitioner and co-defendant Oates in December 1965 and 1966 (A. 15-19). Komins made the payments in the Christmas season, when sums of cash were available for use as business gifts and "so that

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[2] "A." refers to petitioner's appendix in the court of appeals. "Tr." refers to the transcript at trial.

[3] On direct examination, Komins stated that his initial meeting with Oates and petitioner took place shortly after his plant was organized by Local 158, placing that date during the month of October 1965 (A. 10-13). However, during cross-examination the defense introduced exhibits which showed that H-P Tool was actually organized in 1962 and the first contract negotiated at that time (A. 33-34, 38-39).

it would be less obvious when money was withdrawn from the Company" (A. 15). The secretary-treasurer of H-P Tool testified that during the Christmas season in 1965 and 1966 he gave Komins sums of money in cash or checks without knowing the purpose for which the money was to be used (A. 97).

In 1967, H-P Tool sought to have the bi-annual contract with Local 158 changed to a three-year agreement (A. 21-22, 97-99). Komins and the secretary-treasurer of the company met with petitioner and Oates in a Philadelphia restaurant to negotiate the new agreement (A. 22, 97-98). During this luncheon meeting, Komins and petitioner left the dining area and entered into a private discussion (A. 23, 98). In exchange for the requested concession, petitioner requested that the annual payments be increased from $250 to $500 each (A. 23). Thereafter, the company and union entered into a three year contract and the increased payments were made by Komins in two cash installments—$250 each during the months December and January (A. 23-25). The final payment was made in January 1969 (A. 25).[4]

1. While acknowledging that this Court as well as the courts of appeals have recognized that the uncorroborated testimony of an accomplice alone is sufficient to sustain

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[4] In October 1969, Preston Komins appeared before the Grand Jury and was questioned regarding the payments made to petitioner and Oates (A. 25). Komins initially invoked the Fifth Amendment, and later denied any knowledge of the payoffs (A. 26). He was then indicted for perjury. After consultations with his attorney prior to trial for perjury, Komins decided to "tell the truth" (A. 27). In late December 1969, Komins gave statements to the F.B.I. and before the United States Commissioner, detailing the payments he made to petitioner and Oates (A. 27-28). His indictment was subsequently dismissed (A. 29).

a conviction, petitioner argues that this rule should be re-examined. But the continued need for the rule is evidenced by this case, where in the nature of things the transactions do not lend themselves to ready corroboration. As Komins testified, the agreement was solely between himself and petitioner. In any event, as noted above, Komins' testimony was corroborated with respect to a number of crucial details concerning his transactions with petitioner and Oates, such as the 1967 meeting for negotiation of a three-year agreement.

2. Petitioner further contends that the evidence is insufficient to sustain the conviction because Komins' testimony was allegedly insubstantial and incredible. Petitioner bases this argument primarily upon the fact that Komins was uncertain about some of the details of his union contracts and his dealings with petitioner. However, Komins was unequivocal and uncontradicted in his testimony that he had paid specific sums of money to petitioner and Oates over a four year period in order to secure favorable demands from the union which they represented, and the cross-examination of this witness was extremely thorough and complete (A. 29-77). Moreover, during closing argument petitioner's counsel specifically brought the uncertain aspects of Komins' testimony to the attention of the trial judge as finder-of-fact (Tr. 149-156). In these circumstances, the ultimate determination of the credibility of the witness was properly left to the trier of fact who, in the instant case, resolved the issue against petitioner.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

MARCH 1973.